LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 22 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARVIN M. KARPATKIN
RHODA H. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021
Attorneys for Petitioner

MELVIN L. WULF
ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y. 10010
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Rule 58(2) of the Rules of this Court, petitioner respectfully prays for a rehearing of the order denying the petition for a writ of certiorari previously filed. On November 13, 1967, the Court entered an order denying such petition. The order stated that Mr. Justice Douglas was of the opinion that certiorari should be granted.

Rehearing is sought on the grounds of intervening circumstances of substantial effect which may very well be sufficient to persuade additional Justices of this Court to vote to grant the petition.

The intervening circumstances of substantial effect relate to Point I of the petition (pp. 13 to 18), and to Paragraph 1 of petitioner's reply brief (pp. 1 to 3). It was contended

that certiorari should be granted because of an apparent three-way conflict between the circuits concerning the procedural rights available to a selective service registrant who claims conscientious objector classification after an order to report, but before induction. It was pointed out that the *Underwood*[1] rule, which petitioner argued should be made uniformly applicable, was sharply in contrast with the *Gearey* rule announced by the Second Circuit in this case. Although *Underwood* was a decision of a district court, petitioner argued that it was applied in district courts throughout the Third Circuit, and there was no contrary decision anywhere in the Third Circuit.

The elevation, by prosecutorial understanding and usage, of the *Underwood* decision to the status of a Third Circuit-wide precedent, has, since the filing of the petition, been revealed to petitioner's counsel in another case. This strongly emphasizes the sharp divergence between the Second and Third Circuits to such an extent that it might well warrant granting this petition for rehearing.

Petitioner's counsel respectfully advise the Court that they were retained in another case involving a conscientious objector applicant in the State of New Jersey who sought to file his claim after receiving an order to report for induction, but prior to induction, similar to petitioner. The name of this selective service registrant is Geoffrey Bidgood Montagu.[2] Mr. Montagu was allowed to file his form with his local board, but was denied reopening, personal appearance and corresponding administrative appellate rights. When he refused to report for induction as

---

[1] *United States* v. *Underwood*, 151 F. Supp. 874 (E. D. Pa. 1955).

[2] The events of this case are disclosed with Mr. Montagu's express permission.

ordered, the case was reported to the United States Attorney for the District of New Jersey for prosecution. The office of the United States Attorney expressly declined to prosecute on the grounds that under the *Underwood* case the registrant was entitled to all of the procedural rights which he was denied by the board's refusal to reopen. A copy of the letter from the office of the United States Attorney to petitioner's counsel is set forth as Appendix A to this petition.

It is clear that petitioner herein, who resides in New York, in the Second Circuit, has been denied exactly those procedural rights which the United States Attorney for the District of New Jersey recognizes as the entitlement of similarly situated conscientious objector claimants in the State of New Jersey and throughout the Third Circuit.

Petitioner is not alleging a mere speculative difference in treatment to be gleaned from appellate decisions in two circuits. There is revealed in Appendix A irrebuttable evidence that the different rules of the Second and Third Circuits lead to substantial and controlling distinctions in the treatment of selective service registrants. Under the existing situation, under the same federal law, a conscientious objector applicant in New York is convicted and sent to jail where under identical circumstances he would not be prosecuted if he were across the Hudson River in New Jersey.

Certiorari should be granted to declare a uniform rule and remedy this manifest injustice.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the petition for rehearing be granted, that this Court vacate its prior order denying the petition for writ of certiorari, and grant the same, and for such other and further relief as may be just.

Respectfully submitted,

MARVIN M. KARPATKIN
RHODA H. KARPATKIN
Attorneys for Petitioner

MELVIN L. WULF
ALAN H. LEVINE
Of Counsel

Certificate of Counsel Under Rule 58

I, MARVIN M. KARPATKIN, counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that such petition is restricted to the grounds specified in Rule 58 of the Rules of this Court.

MARVIN M. KARPATKIN